BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of Procedural Rules Governing	)	EB Docket No. 17-245
Formal Complaint Proceedings Delegated to the	)	
Enforcement Bureau	)	

COMMENTS OF THE EDISON ELECTRIC INSTITUTE

Edison Electric Institute

Phillip Moeller
Executive Vice President, Business Operations Group and Regulatory Affairs

Aryeh B. Fishman
Associate General Counsel, Regulatory Legal Affairs
Office of the General Counsel

EDISON ELECTRIC INSTITUTE
701 Pennsylvania Avenue, NW
Washington, DC 20004-2696
(202) 508-5000

H. Russell Frisby, Jr.
Brandon R. Nagy
Counsel
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave., NW Suite 800
Washington, D.C. 200006
(202) 785-9100
(202) 785-9163 (Fax)

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In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau	)))))	EB Docket No. 17-245

COMMENTS OF THE EDISON ELECTRIC INSTITUTE ON NOTICE OF PROPOSED RULEMAKING

Pursuant to sections 1.415 and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the Edison Electric Institute ("EEI"), on behalf of its member companies, hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") and Order adopted in the above-referenced proceeding on September 13, 2017.[1]

I. Introduction.

EEI is the trade organization that represents all U.S. investor-owned electric companies and its members provide electricity for 220 million Americans, operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports over seven million jobs in communities across the United States. As providers of electricity to much of America and as owners of a considerable amount of utility poles across the United States, EEI members have considerable expertise in matters concerning communication provider attachment to utility owned electric poles for broadband deployment and the interlocking regulatory schemes

[1] NPRM, *In the Matter of Amendment of Procedural Rules Governing Formal Complaint Proceedings Delegated to the Enforcement Bureau*, EB Docket No. 17-245 (Adopted Sep. 13, 2017).

concerning FCC pole attachments to utility poles and federal and state regulation of electric utility rates and service, and EEI members have a strong interest in ensuring the Commission's proposals for reforming the procedural rules governing pole attachment enforcement actions properly consider the interests of EEI's member customers.

In the NPRM, the Commission seeks comments on proposed rule revisions that are intended to "creat[e] a uniform set of procedural rules for certain formal complaint proceedings delegated to the Enforcement Bureau."[2] Specifically, the NPRM proposes to "streamline and consolidate the procedural rules governing formal complaints filed under Section 208 of the Communications Act of 1934, as amended (Act); pole attachment complaints filed under Section 224 of the Act; and" Disability Access complaints filed under Sections 225, 716, and 718 of the Act.[3]

EEI members strongly support the Commission's goals of decreasing confusion and increasing efficiency in resolving pole attachment complaints. The Commission, however, should be wary of emphasizing the speed of resolution of complaints over the fundamental fairness of the complaint resolution process. The Commission's highest priority should be ensuring that the complaint resolution process remains fundamentally fair to the parties. From a practical perspective, this means that the procedural rules should both provide mechanisms for the development of the parties' cases and establish timelines long enough for the Commission to fully deliberate the parties' presentations of their developed cases.

Although EEI and its members generally support the proposed rule revisions,[4] EEI's members are concerned that, as currently written, the rules leave significant gaps that could

[2] *NPRM*, ¶ 1.
[3] *NPRM*, ¶ 2.
[4] *See* NPRM at Appendix (text of proposed revised rules).

undermine the fundamental fairness of pole attachment complaint proceedings. In particular, the proposed rules do not provide the parties sufficient discovery as a matter of right, do not provide a mechanism for the parties to use the discovery obtained, and risk compressing the timeframes for resolving complaints in a manner that prevents the parties from fairly developing and presenting their cases.

II. EEI supports increasing the amount of discovery afforded to parties, but the proposed rules are asymmetric and do not provide enough discovery.

The NPRM proposes rule revisions that will assist the parties in developing their cases. Requiring information designations "closely aligned" with Federal Rule of Civil Procedure ("Rule") 26[5] and authorizing written interrogatories to be served with the complaint, answer, and reply[6] will assist parties in developing their cases. These modest steps, however, are not enough.

Although the Commission proposes to "closely align" its initial information designation requirement with Rule 26, that rule contemplates symmetric discovery that is significantly more broad in scope and length than the ten or fifteen written interrogatories and several weeks contemplated in the Commission's proposed procedural rules.[7] Not only does Rule 33 provide each party with twenty-five written interrogatories,[8] but parties are also entitled to utilize requests for admission,[9] requests for production,[10] and depositions[11] in order to verify the opposing parties' initial disclosure, develop an evidentiary basis for their case or defense, and preserve testimony for the later adjudicative proceeding. In short, Rule 26 is not an endpoint for

[5] *NPRM*, ¶ 10.
[6] *NPRM*, ¶¶ 11-12.
[7] *Compare* Fed. R. Civ. P. 26, *with* NPRM, ¶¶ 10-12 & Appendix.
[8] Fed. R. Civ. P. 33(a).
[9] Fed. R. Civ. P. 36.
[10] Fed. R. Civ. P. 34 & 35.
[11] Fed. R. Civ. P. 27, 28, 30 & 31.

discovery; it establishes initial disclosure requirements designed to guide and aid significant further discovery.

While EEI's members do not believe that every pole attachment complaint should be subject to the same broad discovery requirements as civil litigation, as currently proposed, the revised rules risk limiting parties to only initial "information designations" and ten or fifteen interrogatories. Such a limitation not only stymies a party's ability to probe the veracity and completeness of the other party's information designations, but it also unfairly asymmetric. The disparity between the number of written interrogatories authorized for complainants (15) and defendant pole owners (10), on its face, undermines the fairness of the proceeding and subjects defendants to greater discovery burdens. Additionally, defendant pole owners will be prejudiced by the proposed rules' authorization of the complainant to file new evidence (as part of an additional or supplemented "information designation")[12] with its Reply brief—effectively preventing defendant pole owner from responding to or conducting necessary discovery related to the new information.

Accordingly, the Commission should consider revising the procedural rules to authorize additional discovery beyond information designations and written interrogatories. And, to the extent the Commission adopts revised rules specifically authorizing certain types of discovery and not mentioning others, the Commission should establish a procedure for a party to obtain additional discovery on a case-by-case basis.[13]

[12] NPRM, ¶ 10.
[13] *See* NPRM, ¶ 11 (explaining that in the Commission's experience, discovery aids "in narrowing the facts and issues in dispute").

III. The proposed rules do not address how the parties are to use the newly authorized discovery.

Although the NPRM proposes requiring information designations and authorizing the service of written interrogatories with the complaint, answer, and reply,[14] the NPRM does not appear to provide the parties with an opportunity to use the discovery obtained therefrom when presenting their cases to the Commission. From the complainant's perspective, if it serves written interrogatories with its complaint, then it will have at most forty days[15] to receive responses from the defendant pole owner and incorporate that new information in its reply. If the defendant pole owner objects to the interrogatories and the Commission's staff must make a ruling, then complainant very well may not receive the discovery prior to filing its reply brief. Additionally, although the proposed rule authorizes the service of five interrogatories with the reply,[16] briefing will have already been completed and the NPRM does not explain how the parties can incorporate those responses into their arguments.

The defendant pole owner, however, has it much worse. Because the pole owner is only entitled to file a single Answering brief,[17] the service of interrogatories upon complainant with that brief cannot possibly assist the pole owner in the development of its case. Moreover, the pole owner will be completely unable to answer any new evidence included in the complainant's reply "information designation." Unless the Commission authorizes post-discovery submissions by the parties, the discovery included in the currently proposed rules will be a burden without benefit. Accordingly, the Commission should not adopt revised procedural rules without implementing a mechanism for the parties to utilize the discovery they will be required to provide and authorized to conduct.

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[14] NPRM. ¶¶ 10-12.
[15] NPRM ¶¶ 8-9 (establishing a 30 day deadline for a response and 10 day deadline for reply).
[16] NPRM ¶ 11.
[17] *See* NPRM, ¶¶ 8-12 & Appendix.

IV. EEI supports a "Shot Clock" for Commission resolution of pole attachment complaints, but the parties must be given the opportunity to fully prepare their cases and the clock should not start until the case has been fully briefed.

The Commission also requests comments on "whether the FCC should adopt shot clocks for [Section 224 pole attachment complaints]."[18] EEI believes all parties should have quick resolution of their complaints before the Commission, and supports implementation of a shot clock to spur efficient adjudication of Commission pole attachment decisions. Such efficiency must be balanced with ensuring both parties receive due process and are able to fully prepare their cases. To achieve this balance, EEI proposes the that the shot clock should not start upon the filing of the complaint, but only start once both parties have been able to fully brief their case. If the clock only starts after the case has been fully briefed, then it is likely that the shot clock could be reduced from the 180 days proposed by the Commission[19] to some lesser timeframe. This approach would allow for both parties to fully prepare their cases while still allowing for efficient resolution of complaints. It would also allow a specific amount of time for the Commission to make its decision instead of being rushed to meet the clock in cases where discovery and briefing could go long and eat up most of the 180 day clock. Additionally, it would reduce the need of the Commission to justify and enact a potential "pause" to the shot clock for cases where the discovery and briefing stages take a very long time. Accordingly, the Commission should implement a shot clock that allows adequate time for Commission deliberation after the cases are fully briefed.

[18] NPRM, ¶ 19.
[19] Broadband Deployment NPRM, ¶¶ 47-51.

V. Utilizing an accelerated docket risks compressing the timeframes for resolving complaints in a manner that prevents the parties from fairly developing and presenting their cases.

In the NPRM, the Commission proposes to "streamline" its Accelerated Docket rules and "extend the option of requesting inclusion on the Accelerated Docket to Section 224 [pole attachment] complaints."[20] Although EEI supports streamlining the complaint process through the use of a "shot clock" *after* the cases are fully briefed, EEI cannot support streamlining proposals that could deny a party sufficient time to fairly develop and brief its case. Consequently, while an accelerated docket may be beneficial in certain pole attachment complaint cases, the Commission should be wary of establishing a procedure that would compress timelines—including the discovery and briefing schedules—such that the defendant pole owner is unable to fairly develop and present its case. By virtue of being the party that controls when a complaint is initially filed, the complainant pole attacher will always have a significant preparation-time advantage over the defendant pole owner. In a normal-length proceeding wherein the defendant pole owner has sufficient time to prepare its case, the complainant's pre-filing preparation advantage may be minimal. If adjudication timeframes are compressed with an Accelerated Docket, however, the defendant pole owner may not have sufficient time to develop and present its case, and the complainant pole attacher's advantage would unfairly grow. Consequently, the Commission should carefully consider the effects an Accelerated Docket will have on a defendant's ability to fairly develop and present its case.

Additionally, in the context of an Accelerated Docket, the significant pre-filing preparation-time advantage enjoyed by the complainant pole attacher is balanced by the fact that, under the current framework, the complainant bears the burden of proof. The allocation of that burden of proof, however, is the subject of a separate proceeding, *In the Matter of Accelerating*

[20] NPRM, ¶ 18.

Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment ("Broadband Deployment NPRM"), WC Docket No. 17-84 (Released April 21, 2017), wherein the Commission has proposed various changes to the pole attachment complaint process including shifting the burden of proof from the complainant attacher to the defendant pole owner for certain proceedings.[21]

In this NPRM,[22] the Commission has noted that its proposal to expand an Accelerated Docket to pole attachment complaints would not be impacted by the changes proposed in the Broadband Deployment NPRM. When revising its procedurals rules in this proceeding, however, the Commission should carefully consider both the potential cumulative effects of the various changes proposed in other proceedings, and the ongoing advice supplied by the Commission's Broadband Advisory Group. After all, the proposed pole attachment procedural revisions are not occurring in a vacuum; regulated entities, such as EEI's members, will be subject to the cumulative effects of the rule changes implemented by all applicable Commission proceedings.

As one example of patent unfairness, the cumulative effect of compressing the complaint resolution timeframe with an Accelerated Docket (this NPRM) and shifting the burden from complainants to pole owners (the Broadband Deployment NPRM) creates an impossible-to-win situation for pole owners subject to some types of Section 224 rate cases. In the Broadband Deployment NPRM, the Commission proposes flipping the burden of proof from the complainant to the defendant pole owner to prove by clear and convincing evidence that the benefits enjoyed by the ILEC in their joint use or joint ownership agreement "far outstrip" the

[21] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, ¶¶ 47-51 (Released Apr. 21, 2017).
[22] NPRM, ¶ 18 n.38.

benefits afforded to other attachers subject to pole attachment agreements.[23] But these complex rate cases require significant time and information resources to defend, and shifting the burden to pole owners will only lengthen the time needed to adequately prepare a defense. For these sorts of cases, and others, an Accelerated Docket would unfairly deny defendant pole owners adequate time to develop and present their cases.

In order to prevent such patently unfair interactions of the Commission's various pole attachment complaint rule changes, the Commission should not examine its Accelerated Docket proposal in isolation, as suggested in this NPRM.[24] Rather, the Commission should carefully consider the cumulative effects of implementing an Accelerated Docket upon all other proposed pole attachment complaint changes,[25] including the proposed shift in the burden of proof, which EEI's members oppose.[26] If, upon consideration, the Commission does decide to expand Accelerated Dockets as proposed, then the Commission should ensure that the timeframes for resolving complaints are not compressed in a manner that prevents the parties from fairly developing and presenting their cases.

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[23] *Broadband Deployment NPRM*, ¶ 45; EEI July 17, 2017 Reply Comments, WC 17-84, at 13.
[24] NPRM, ¶ 18 n.38.
[25] Such as the proposals in the *Broadband Deployment NPRM*.
[26] *Broadband Deployment NPRM*, ¶ 45; EEI July 17, 2017 Reply Comments, WC 17-84, at 12-14.

WHEREFORE, EEI respectfully requests that the Commission consider these comments and ensure that any future Commission action ordered as a result of this proceeding is consistent with them.

Respectfully submitted,

EDISON ELECTRIC INSTITUTE
/s/ Phillip Moeller
Executive Vice President, Business Operations Group and Regulatory Affairs

Aryeh B. Fishman
Associate General Counsel, Regulatory Legal Affairs
Edison Electric Institute
Washington, D.C. 20004
(202) 508-5000
afishman@eei.org

H. Russell Frisby, Jr.
Brandon R. Nagy
Counsel
STINSON LEONARD STREET LLP
1775 Pennsylvania Ave., NW Suite 800
Washington, D.C. 200006
(202) 785-9100

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